

WAN MOHD KAMIL WAN MOHAMAD

a

v.

PP

COURT OF APPEAL, KUALA LUMPUR

b

MOKHTAR SIDIN JCA

ABDUL KADIR SULAIMAN JCA

PAJAN SINGH GILL JCA

[CRIMINAL APPEAL NO: B-05-13-1996]

5 FEBRUARY 2003

c

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Presumption of trafficking - Whether trial judge based finding upon presumption of possession - Whether trial judge erred in using double presumption test*

d

The accused was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in cannabis and sentenced to death. The accused denied the charge framed against him. In appealing against the said decision, counsel contended that trial judge had erred in accepting the evidence of the chemist. It was also argued that the trial judge had misdirected himself in invoking the presumption of trafficking upon the presumption of possession of ganja under s. 37(d) of the DDA.

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Held:**Per Pajan Singh Gill JCA**

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[1] The chemist had taken random samples from the different parts of the impugned drugs in both packages for analysis. From the evidence, the chemist had clearly carried out a detailed analysis of the plant contained in the two packets and had positively testified that the test results showed that the plant material examined by him was cannabis as defined under s. 2 of the DDA. (p 670 a)

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[2] The trial judge made no affirmative finding of possession on the evidence. He merely relied on the legal presumption of possession under s. 37(d) of the DDA. Having relied on that presumption, he proceeded to make a further presumption of trafficking against the accused under s. 37(da) in view of the amount of drugs. The trial judge had clearly applied the "double presumption" test, thereby misdirecting himself in law. (pp 670 b-c & 671 f)

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a Obiter:

- b* [1] The defence of the appellant in the present case was a total denial of the possession. A distinction should be drawn between a mere denial, *vis-à-vis* an explanation in a defence, that although he was in possession of the drug, he was an innocent or momentary carrier. (p 672 c)
- c* [1a] In *Mohamad Radhi*, the Supreme Court had held that **unless the evidence in a particular case does not obviously so warrant**, it was incumbent upon the court to consider whether on a balance of probabilities the defence had rebutted the statutory presumption of trafficking under s. 37(da) of the DDA as a separate exercise, even though the court is satisfied that the presumption of possession under the said section had not been rebutted. The phrase emphasised would apply, where total denial is pleaded as in the circumstances of the present case, in which instance the trial judge need not undertake a separate exercise as he had seemed to have done in respect of the statutory presumption under s. 37(da). (pp 672 d-f)
- d*

[Death sentence quashed; appellant sentenced to five years' imprisonment commencing from date of arrest.]

e [Bahasa Malaysia Translation Of Headnotes

- f* Tertuduh dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar canabis dan dihukum mati. Tertuduh menafikan tuduhan yang dihadapkannya. Dalam rayuannya terhadap keputusan tersebut, peguam telah menghujah bahawa hakim perbicaraan tersilap dalam menerima bukti ahli kimia. Telah juga diutarakan bahawa hakim perbicaraan tersalah-araf dirinya dalam memakai andaian mengedar berlandaskan andaian milikan ganja di bawah s. 37(d) ADB.

Diputuskan:

g Oleh Pajan Singh Gill HMR

- h* [1] Ahli kimia tersebut telah mengambil sampel secara rawak daripada bahagian-bahagian berasingan dadah yang dipersoalkan dalam kedua-dua bungkusan untuk dianalisis. Daripada bukti yang sedia ada, ahli kimia tersebut jelasnya telah menjalankan suatu analisa terperinci atas tumbuhan yang terkandung di dalam dua bungkusan tersebut dan dengan positifnya telah memberi keterangan bahawa keputusan ujian menunjukkan bahawa bahan tumbuhan yang diperiksa oleh beliau adalah cannabis seperti yang diperuntukkan di bawah s. 2 ADB.

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- [2] Hakim perbicaraan tidak membuat dapatan milikan yang pasti atas bukti yang sedia ada. Dia hanya memakai andaian milikan di bawah undang-undang di bawah s. 37(d) ADB. Setelah bergantung kepada andaian tersebut, dia seterusnya membuat andaian mengedar terhadap tertuduh di bawah s. 37(da) berpandukan kuantiti dadah berkenaan. Adalah jelas bahawa hakim perbicaraan telah menggunakan ujian andaian berganda, dan dengan itu telah menyalaharah dirinya.

Obiter:

- [1] Pembelaan tertuduh dalam kes semasa adalah penafian terhadap milikan. Suatu pembezaan harus dibuat di antara penafian semata-mata, bertentangan dengan suatu penjelasan dalam pembelaan, iaitu walaupun dadah berada dalam milikannya, dia hanyalah merupakan seorang pembawa semata-mata atau pembawa sementara.

- [1a] Dalam Mohamad Radhi, Mahkamah Agung telah memutuskan bahawa **melainkan bukti dalam sesuatu kes tertentu tidak dengan ketara memerlukan**, adalah wajib untuk mahkamah menimbangkan sama ada atas imbalan kebarangkalian pihak pembela telah menyangkal andaian statutori mengedar di bawah s. 37(da) ADB sebagai suatu pertimbangan yang berasingan, walaupun mahkamah puas hati bahawa andaian milikan di bawah seksyen tersebut tidak disangkal. Ungkapan yang dititikberatkan terpakai, dimana terdapat penafian keseluruhan seperti dalam keadaan kes semasa, dalam keadaan mana hakim perbicaraan tidak perlu membuat suatu pertimbangan berasingan seperti mana dia kelihatan melakukannya terhadap andaian undang-undang di bawah s. 37(da).

Hukuman mati dibatalkan; perayu dihukum lima tahun penjara bermula dari tarikh penangkapan.]

Case(s) referred to:

Andy Bagindah v. PP [2000] 3 CLJ 289 CA (refd)

Leong Bon Huat v. PP [1993] 3 CLJ 603 SC (dist)

Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC (refd)

Muhammed Hassan v. PP [1998] 2 CLJ 170 FC (refd)

Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC (refd)

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da), 39B(1)(a)

- a* For the appellant - Karpal Singh (Gobind Deo Singh); M/s Karpal Singh & Co
For the respondent - Mohd Iskandar Ahmad DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 47-12-1995]

Reported by M Maheswaran

b

JUDGMENT

Pajan Singh Gill JCA:

- c* This is an appeal against the decision of the High Court, Shah Alam where the appellant was charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and sentenced to death at the conclusion of the trial.

- d* The facts briefly stated leading to the arrest of the appellant are as follows. On 27 December 1994 at about 11am Detective Corporal 65379 Rahim bin Sulaiman (PW6) together with Detective Corporal 63202 Jaafar bin Mahadon (PW7) and Detective Sergeant 64011 Khabri bin Hj. Dollah on instruction of Chief Inspector Hassan Jalaluddin (PW8) went on patrol duty on two motorcycles. They were instructed to keep a look out for a motorcar no. BDH 883.

- e* At about 11.30am when PW6 and PW7 were on their patrol duty, PW6 saw a car parked outside house no. 9, Jalan 1/1, Bandar. They saw the appellant standing beside the car on the driver's side. At this juncture PW6 introduced himself as a member of the police force. He then seized a bunch containing 11 keys from the right hand pocket of the appellant's trousers. After that he proceeded to search the inside of the car, and in the course of his search, he discovered a box on the floor of the car in front of the passenger's seat. When he opened the box he found two slabs of dried leaves which he suspected to be ganja. PW6 then informed PW8 of what he had found in the car, and PW8 examined the box and its contents.

- f* After that PW8 with a key from the bunch of keys seized from the appellant opened the door, to house no. 9, Jalan 1/1, Bandar Kinrara, Puchong. In the course of searching the house, PW8 discovered certain items suspected to be ganja. However, the items seized in the house do not form part of the charges against the appellant. The appellant at the trial denied the charge framed against him.

- g* At this hearing of the appeal before us counsel for the appellant raised a number of issues. However, two pertinent issues worthy of consideration, are, firstly, that the trial judge was wrong in accepting the evidence of the chemist PW4, and secondly, that the trial judge was wrong in invoking, the presumption of trafficking upon a presumption of possession of ganja, thereby seriously misdirecting himself in law.
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In respect of the issue of the evidence of the chemist, he stated that he conducted a separate analysis of the content of the packets marked as A and A1 which were handed to him by Ketua Inspektor Abdul Razak bin Hassan. In his evidence he stated:

I conducted separate analysis on the two packets i.e. A and A1. For packet A what I did were as follows:

1. I obtained the net weight of the block of the compressed plant material. I then loosen up completely the compressed plant material to carry out the physical examination on all the plant material. I found all the plant material to belong to one type similar to cannabis. No foreign material in it.
2. I then carried out microscopic examination on all the plant material and found all of them to bear the characteristic features of cannabis. They are:
 - (i) cystolith hairs
 - (ii) simple hairs
 - (iii) grandular hairs
 - (iv) abundance resin at their natural state.

My conclusion after the two examinations is that the entire plant is from genus cannabis.

I, after that took 32 random samples from the bulk of the plant material to perform the Duquenois-Leyine Test (DLT) and Thin Layer Chromotrophy (TLC). The purpose of the two tests is to detect the presence of cannabinoid in the resin that I observed in all the plant material. From the two tests that I did, I concluded that cannabinoid were present. Therefore I conclude that all the plant material from the compressed in A, is cannabis as defined under s. 2 of the DDA 1952.

Similar analysis was carried out from the compressed block plant material marked A1. I obtained the same result that they were cannabis as defined under s. 2 of the DDA 1952.

Cannabinoid are the active ingredient of cannabis. After the physical and microscopic examination, I have concluded that all the plant material were of genus cannabis. There was only one type of plant material. So if any part of the plant material is found to be cannabis as defined under s. 2 of the DDA, the entire bulk must be the same. Therefore there is no necessity to subject the entire plant materials for the DLT and TLC test.

- a* We observed that the chemist took representative samples at random, from the different parts of the impugned drugs in packages A and A1 for analysis. We are of the view that the facts in the case of *Leong Bon Huat v. Pendakwa Raya* [1993] 3 CLJ 603 SC referred to us by appellant's counsel are distinguishable, as in that case, the chemist stated that out of the total amount of cannabis weighing 793.85 grammes, he merely took representative samples of 79.30 grammes for analysis, leaving the balance of the cannabis not analysed.

- b* It is clear that the chemist carried out a detailed analysis of the plant contained in the two packets and he testified positively that the result of his test showed that the plant material examined by him was cannabis as defined under s. 2 of the DDA 1952.

c It is our considered view the evidence given by the chemist was satisfactory and cannot be faulted. In the premise we hold that the appeal on this issue is without merit.

- d* There is, however, merit in the second ground of appeal advanced before us by counsel for the appellant. Learned counsel, Mr. Karpal Singh argued that the trial judge had wrongly found the appellant to be trafficking in the said drugs, by merely acting on the presumptions under s. 37(d) and (da) of the DDA 1952. In other words, the trial judge first found the appellant to have had custody and control of the drug in question. He accordingly in terms of s. 37(d) of the Act presumed that the appellant was in possession of the drug. Having found the appellant to be in possession through the process of reasoning as stated above, the learned judge held the appellant to be a presumed trafficker under s. 37(da), since he was "found in possession" of more than the statutory minimum prescribed in the subsection.

- e* Counsel for the appellant argued that by applying a "double presumption" test against the appellant, the trial judge had seriously misdirected himself in law. Counsel relied on a number of cases to support his argument, but the case of *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170 FC is most relevant to the facts of this appeal. The court in *Muhammed Hassan* stated at p. 190:

- h* In our view, there is a clear undeniable distinction between the word 'deemed' used in s. 37(d) and the word 'found' employed in s. 37(da) of the Act. The 'deemed' state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie, the finding of custody or control. Such presumptions as under s. 37(d) (and, for that matter, the one under s. 37(da) are sometimes described as 'compelling

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presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution), the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s. 37(da) connotes a finding after a trial by the court.

Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s. 37(d) of the Act and those required to raise 'presumed ... trafficking' under s. 37(da) are different. To come to the presumptions of possession and knowledge under s. 37(d), one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned Deputy Public Prosecutor – a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

In our view, to constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

We feel that the trial judge, with respect, made no affirmative finding of possession on the evidence. He merely relied on the legal presumption of possession under s. 37(d) of the Act. Having relied on the presumption under s. 37(d) he proceeded to make a further presumption of trafficking against the appellant under s. 37(da) in view of the amount of drugs. The trial judge had clearly applied the "double presumption" test, thereby misdirecting himself in law.

However, we have not overlooked the Federal Court case of *Tunde Apatira & Ors v. Pendakwa Raya* [2001] 1 CLJ 381 FC. In that case Gopal Sri Ram JCA stated at p. 390:

As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of the court in *Alcontara a/l Ambross*

- a* *Anthony v. Public Prosecutor* [1996] 1 CLJ 705 exemplifies the general rule, while that in *Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151 illustrates the exception.

On the facts of the case, we are not minded to consider the proviso of s. 60 of the Courts of Judicature Act 1964 to sustain the conviction of trafficking as we find a paucity of evidence on the facts of the case to suggest trafficking within the definition of s. 2 of the Dangerous Drugs Act 1952, or carrying out a preparatory act done for the purpose of trafficking.

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- c* In passing, an important aspect that was overlooked by the trial judge and counsel when addressing the court was that the defence of the appellant in the present case was a total denial of possession of the drug. This has an important bearing, as a distinction should be drawn between a mere denial, *vis-a-vis* an explanation in a defence, that although he was in possession of the drug, he was an innocent carrier, or a momentary carrier.

- d* In the Supreme Court case of *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC the court held that unless the evidence in a particular case does not obviously so warrant, it is incumbent upon the court to consider whether on a balance of probabilities the defence has rebutted the statutory presumption of trafficking under s. 37(da) of the Act,
- e* as a separate exercise, even though the court is satisfied on a balance of probabilities that the presumption of possession under s. 37(d) of the Act has not been rebutted.

- An important qualification in *Mohamad Radhi's* case is the phrase "Unless the evidence in a particular case does not obviously so warrant". This phrase to one's understanding, would apply, where total denial in the circumstances of the present case, there was thus no need for the trial judge to undertake a separate exercise as he had seemed to have done in respect of the statutory presumption under s. 37(da) of the DDA. In this we are fortified by the recent decision of *Andy Bagindah v. Pendakwa Raya* [2000] 3 CLJ 289 CA where
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- g* Shaik Daud Md Ismail JCA had this to say about the defence of a total denial in the context of the direction in *Mohamad Radhi's* case. He stated at p. 292:

- h* In the present case, the appellant had denied possession and the learned Judge found that after considering the whole evidence, including that of the appellant, he was satisfied that the prosecution had proved their case beyond a reasonable doubt and the appellant had failed to raise any doubt, we find no reason to disagree with the learned judge. Therefore, the circumstances in the present case did not warrant the learned judge to undertake a separate exercise.

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Having reviewed the evidence afresh, and the law in totality, the court amended the charge against the appellant to one of under s. 12(2), quashed the sentence of death, and sentenced the appellant to five years' imprisonment with effect from his date of arrest.

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